No. 14112

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Lois J. Newman (formerly Lois J. Senderman),
Petitioner.

vs.

Commissioner of Internal Revenue,
Respondent.

PETITIONER'S REPLY BRIEF.

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Introductory Statement.

Respondent's brief is postulated on the theory that the form of the transaction, and not the substance, is to govern the determination of petitioner's tax liability.

Respondent fails to answer petitioner's contention that all of the evidence, including the written instrument, *prepared and executed by Richard S. Goldman,* compels a finding that petitioner intended to make a completed gift in 1943 and did make a completed gift; that the written instrument confirmed that the gift had been made and petitioner's minor daughter was the owner of 800 shares of Aztec Brewing Company stock. Respondent does not deny the intention to make a completed gift in 1943, but seeks to sustain the Tax Court decision by pointing to the "form" of the transaction in that the written instrument did not contain the word "irrevocable."

However, even assuming the "form" of the written instrument is the only test, respondent has failed to answer

the arguments contained in Point V of petitioner's opening brief that the clear language of the written instrument reveals that it does not create a revocable trust but is simply an acknowledgment by Mr. Goldman that he is holding 800 shares of Aztec Brewing Company stock for Lois E. Senderman, a minor, which minor is declared to be the owner of said 800 shares of stock. [Op. Br. pp. 31-37; R. 38.]

Moreover, there is nothing contained in respondent's brief, either by way of recital of facts or citation of authority, to support respondent's contention that a transfer of assets in 1946 from what respondent contends is a revocable trust to a guardianship, *ipso facto* converted a revocable gift into an irrevocable gift.

Although respondent cannot point to a single donative act (or any other type of act) of petitioner subsequent to 1943, respondent finds no difficulty in contending that petitioner made a taxable gift in 1946.

Summary of the Argument.

1. Petitioner made a gift in 1943 and did nothing subsequent thereto to support a ruling that the completed gift occurred in 1946.

2. Subsequent to 1943, petitioner could not have prevented the transfer of the trust assets to the minor's guardian.

3. If the gift was revocable in 1943, the transfer of the assets from the trustee to the guardian in 1946 did not make the gift irrevocable; accordingly the Court should hold the gift was irrevocable in 1943.

4. Even assuming that the transfer of the trust assets to the guardian in 1946 transmuted a revocable gift to an irrevocable gift, the imposition of a gift tax is foreclosed under the doctrine of *Harris v. Commissioner.*

5. Petitioner made a completed gift in 1943.

I.

Petitioner Made a Gift in 1943 and Did Nothing Subsequent Thereto to Support a Ruling That the Completed Gift Occurred in 1946.

As noted in petitioner's opening brief, the record contains uncontradicted testimony that in 1943 the petitioner made a completed oral gift of 800 shares of Aztec Brewing Company stock to her daughter by orally instructing Mr. Goldman that as to the 2396⅞ths shares of said stock he held in his name as "Trustee," he was to thenceforth hold 800 shares thereof for petitioner's minor daughter. [Op. Br. pp. 4-7; R. 26-27, 125-129, 158-160.]

We submit that this is the only donative act of petitioner to be found in the record.

To confirm that oral transaction, Mr. Goldman prepared and executed a written instrument reciting that petitioner's minor daughter *owned* 800 shares of Aztec Brewing Company stock and that he, Goldman, agreed to hold said stock, and any other property the minor daughter might deposit with him, as "trustee" under certain terms and conditions.[1]

All of the said acts were done in 1943, there is nothing in the record to show any act of petitioner subsequent to 1943 which can be held to be an act of making a gift or completing a gift.

A. The Death of Richard S. Goldman.

Upon the death of Richard S. Goldman in 1946, his son, Richard N. Goldman, was appointed the executor of his estate.

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[1]The nature of that instrument is fully discussed in petitioner's opening brief at pages 7 to 9 and 31 to 37 thereof. However, it is important to note that petitioner did not execute said instrument as "trustor" but executed it "individually" and "as Mother and Guardian of Lois E. Senderman, a minor." [R. 41.]

Petitioner had nothing to do with the death of Mr. Goldman nor with the appointment of his son as his executor. Certainly respondent will not contend that petitioner made an incomplete gift which was to become complete upon the death of Mr. Goldman.

B. The Appointment of a New Trustee.

The written instrument pursuant to which Mr. Goldman agreed to hold the minor's property expressly provided that upon his death, his executors should deliver the minor's property to her duly appointed guardian and if no guardian had been appointed, to apply to a Court of competent jurisdiction for the appointment of a guardian. [R. 39-40.]

Notwithstanding this provision, upon Mr. Goldman's death, his executor petitioned for the appointment of Clarissa Shortall as successor trustee. [R. 28-29, 56-59.][2]

Certainly respondent does not contend this was an act of petitioner which constituted making a taxable gift or completing a gift.

C. Transfer of the Assets to the Minor's Guardian.

Shortly after Clarissa Shortall was appointed successor trustee, *Mr. Goldman's executor* petitioned for the appointment of Miss Shortall as guardian of petitioner's minor daughter in order that the *minor's estate* held pursuant to the written trust instrument executed by Mr. Goldman could be transferred to the minor's guardian as provided in said written instrument. [R. 29, 61-65.]

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[2]Said petition was made in a proceeding designated "In the Matter of the Irrevocable Trust of Lois E. Senderman, Beneficiary, and Lois J. Senderman, Donor and Trustor, and Richard S. Goldman, Trustee." [R. 28, 56.]

Pursuant to said petition the Supreme Court appointed Miss Shortall as the minor's guardian and as such guardian she took possession of the minor's estate.

Respondent fails to explain how this event constituted an act by petitioner in 1946 whereby she completed a gift to her daughter. Just what did petitioner do in 1946 that made this a gift on her part?

To illustrate the lack of merit in respondent's position, we pose the important question:

> What could petitioner have done in 1946 to prevent the transfer of the assets to the minor's guardian?

We submit that there was nothing she could do to prevent such a transfer since she had made a completed gift in 1943. The next section of this brief considers this question in detail.

II.

Subsequent to 1943, Petitioner Could Not Have Prevented the Transfer of the Trust Assets to the Minor's Guardian.

Even adopting respondent's position that the "form" of the written instrument is to govern the determination of the nature of the transaction, it is our position that subsequent to 1943 there was nothing petitioner could have done pursuant to said written instrument to prevent the transfer of the assets to the minor's guardian. Paragraphs (2) and (3) of the written instrument clearly support this contention. [R. 39-40.]

Paragraph (2) of said written instrument provides:

> "(2) Said Trustee agrees to transfer and deliver to any duly appointed Guardian of the estate of Lois

> E. Senderman, a minor, all of the corpus and accumulated income of the trust estate, and in the event that no such Guardian is appointed the Trustee will deliver to Lois E. Senderman upon her reaching the age of 21 years all of the property of said trustee estate then remaining in his hands. If said Lois E. Senderman shall die prior to her reaching the age of 21 years said Trustee undertakes and agrees to deliver to the personal representative of said Lois E. Senderman any portion of the corpus or accumulated income of said trust estate." [R. 39.]

Accordingly, if at any time subsequent to 1943 a guardian were appointed for Lois E. Senderman, Mr. Goldman would have had to transfer all of the minor's property held by him to such guardian. Let us assume that prior to Mr. Goldman's death in 1946 a guardian had been appointed for Lois E. Senderman, Mr. Goldman would have had to transfer the assets to the guardian even though petitioner desired that he continue to act as trustee of the minor's estate. Certainly, the Government would not contend that this would constitute an act of petitioner whereby she made a taxable gift at the time of such transfer.

Similarly, if the petitioner's minor daughter had died subsequent to 1943, Mr. Goldman would have had to deliver to her personal representative the assets held by him pursuant to said written instrument. Would the Government contend that such delivery by Mr. Goldman to the minor's executor constituted a gift by petitioner?

These observations with respect to the effect of paragraph (2) of said written instrument are important, not only with respect to demonstrating that petitioner could not have prevented the transfer of the trust's assets to

the minor's guardian, but as indicative of the fact that in 1943, when the written instrument was executed, Mr. Goldman and petitioner treated the 800 shares of Aztec Brewing Co. stock as being owned by petitioner's daughter.

The same interpretation must be given to paragraph (3) of the written instrument, which provides:

> "(3) The Trustee may resign and discharge himself of the trust created hereunder by causing the property which he holds as Trustee to be transferred into the name of the duly appointed Guardian of said Lois E. Senderman, a minor. In the event of the death of the Trustee while this trust shall remain in force and effect his executors, administrators or heirs at law, as the case may be, are hereby directed and empowered to immediately apply to a court of competent jurisdiction to deliver to the duly appointed guardian of Lois E. Senderman, a minor, that portion of the trust property as to which Lois E. Senderman is the beneficial owner. If no such Guardian has been appointed the executors, administrators or heirs at law of said deceased Trustee shall apply to a Court of competent jurisdiction for the appointment of a Guardian to whom such property can be conveyed." [R. 39-40.]

Pursuant to said paragraph (3), at any time subsequent to 1943, Mr. Goldman could have elected to discharge himself of the trust he had assumed by transferring the minor's property held by him to a duly appointed guardian of the minor. If Mr. Goldman had not died in 1946, but had elected to transfer the assets to the minor's guardian, certainly this act of Mr. Goldman would not have constituted an act of petitioner imposing liability on her for gift tax. Clearly petitioner could not have prevented such resignation and transfer of assets to the minor's guardian.

For the same reason as set forth above, the transfer of the minor's assets to her guardian upon the death of Mr. Goldman did not constitute a gift by petitioner. Pursuant to the terms of the written instrument under which Mr. Goldman held the property for the minor, petitioner could not have prevented such transfer of the assets to the guardian.

Pursuant to the written instrument, the assets held by Mr. Goldman had to be transferred to the guardian of the minor upon the happening of any of the following events:

1. The appointment of a guardian for the minor.
2. The minor's attaining the age of 21 years, in which event the assets were to be transferred to petitioner's daughter.
3. The minor's death prior to attaining the age of 21 years.
4. The resignation of Mr. Goldman as trustee.
5. The death of Mr. Goldman.

Upon the occurrence of any of these events, the property was to be transferred from the trusteeship to the guardianship and petitioner did not reserve any right to prevent such transfer.

It is our position that such transfer would not constitute a change in ownership since at all times since 1943 the minor owned the property involved. The only difference would be that instead of having the property held for her by Mr. Goldman as her trustee, the property would be held by the minor's guardian.

III.

If the Gift Was Revocable in 1943, the Transfer of Assets From the Trustee to the Guardian in 1946 Did Not Make the Gift Irrevocable; Accordingly the Court Should Hold the Gift Was Irrevocable in 1943.

Respondent finds itself in a dilemma. In order to sustain its position, respondent must assert that there was no gift in 1943, but contend that a gift was made by petitioner in 1946. However, respondent cannot point to anything that the petitioner did in 1946 to make a gift.

Neither the Tax Court decision nor respondent's brief herein point to any authority to support the conclusion that the transfer of the assets to the minor's guardianship estate in 1946 *ipso facto* converted a revocable gift into an irrevocable one.

Petitioner and respondent agree that at the end of 1946 the petitioner's minor daughter owned the assets represented by the gift of 800 shares of Aztec Brewing Co. stock in 1943. Respondent says the gift was made in 1946 but cannot support that position by a reference to any facts whereby petitioner made a gift in 1946 or did anything in 1946 to complete her 1943 gift.

The fallacy of respondent's position can be best illustrated by assuming the following facts: In 1943 when petitioner made a gift, she made it subject to a contingency that if her own assets were depleted, she would have the right to revoke the gift. Certainly if Mr. Goldman had taken charge of the property as trustee subject to those conditions and had subsequently died, the stock could have been transferred to the minor's guardian, subject to peti-

tioner's right of revocation. The transfer of the minor's property from the trustee to her guardian would not make a revocable gift an irrevocable gift since the mere transfer to the guardian would not defeat petitioner's right to revoke the gift should her own assets be depleted. Certainly, a minor's guardianship estate can consist of the contingent interest in property; there is no rule of law that a minor's guardanship estate must consist of property in which the minor owns all right, title and interest without any contingency or limitations.

Accordingly, if the gift was revocable in 1943, the mere transfer of the assets to the minor's guardian did not make it irrevocable. However, since the parties to this controversy agree that the minor owns the assets irrevocably at this time, the only conclusion possible is that the minor owned the assets irrevocably from 1943 to the present time.

We submit that the valid decree of the California Probate Court construing the oral trust made in 1943 as irrevocable is binding upon the Tax Court and should be followed by this Court. (See Op. Br. pp. 13-22.)

There is no question but that California law determines whether the gift is revocable or irrevocable. (*Freuler v. Helvering,* 291 U. S. 35, 54 S. Ct. 308 (1934).)

If the Tax Court is to be permitted to disregard the California Court's ruling as to the State law governing this controversy, it should have at least cited some state law upon which it could rely to hold that a revocable gift in 1943 becomes irrevocable merely because a minor's trustee holding the property transfers the property to the minor's duly appointed guardian. The Tax Court decision and respondent's brief completely overlook this problem and simply assume that a revocable gift is *ipso facto* transmuted to an irrevocable gift by the transfer of the property from a trustee holding the property for the minor to the minor's guardian.

IV.

Even Assuming That the Transfer of the Trust Assets to the Guardian in 1946 Transmuted a Revocable Gift to an Irrevocable Gift, the Imposition of a Gift Tax Is Foreclosed Under the Doctrine of Harris v. Commissioner.

In support of its contention that the transfer of the trust assets to the guardian pursuant to a court order does not foreclose imposition of the gift tax under the doctrine of *Harris v. Commissioner of Internal Revenue,* 340 U. S. 106, 71 S. Ct. 181 (1950), respondent argues:

> "Although there was no completed gift here in 1943, the Tax Court nevertheless found that the taxpayer [R. 108] harbored the same donative intent at all times here material, including 1946. Under the terms of the written trust instrument, the death of the original trustee in 1946 required the termination of the trust and the transfer of its corpus to a guardian for the taxpayer's daughter. The concomitance, on May 23, 1946, of donative intent and unconditional transfer of the property to the guardian gave rise to a completed gift, with consequent gift tax liability in that year. Internal Revenue Code, Sections 1000 and 1002 (Appendix, *infra*). *Cf. Latta v. Commissioner,* 212 F. 2d 164 (C. A. 3rd), and *Camp v. Commissioner,* 195 F. 2d 999 (C. A. 1st), involving transfers in trust in which the settlors had retained powers to revoke or revise, dependent upon the agreement of others without adverse interest. It was held that the original transfers did not constitute completed gifts for federal tax purposes, but that gift tax liability was properly evoked in subsequent years upon actual deletion or relinquishment of the powers to amend." (Resp. Br. pp. 24-25.)

We would like to consider this argument in detail:

(1) There Is No Evidence of Donative Intent on May 23, 1946.

There is no evidence to support a finding of donative intent of petitioner subsequent to 1943. Petitioner thought that she had made an irrevocable gift in 1943, and accordingly, there was nothing with respect to which she could have retained a donative intent in 1946. Respondent fails to point to any evidence in the record to support the finding of donative intent in 1946.

Even assuming a donative intent in 1946, the answer to respondent's argument is contained in the second sentence of the above quoted portion of respondent's brief, wherein respondent recognizes that under the terms of the 1943 written instrument, the death of Mr. Goldman in 1946 required the termination of the trust and transfer of its corpus to a guardian of petitioner's daughter.

Accordingly, whether or not petitioner harbored donative intent in 1946 is immaterial, since she could not have successfully prevented a court order transferring the property to the minor's guardian even if she wanted to recapture the property.

(2) There Was No Unconditional Transfer of Property in 1946 Giving Rise to a Completed Gift, With Consequent Gift Tax Liability in That Year.

All that happened in 1946 was that upon the death of Mr. Goldman, all of the minor's right, title and interest in the property held by the minor's trustee was transferred to the minor's guardian. If the interest in the property held by the minor's trustee was a contingent interest, there was nothing in the 1946 Court order to

remove that contingency. There was no act of petitioner transmuting the nature of the 1943 gift.

Respondent is unable to point to any act of petitioner in 1946 which can possibly be construed as a transfer of property to her minor daughter. In brief, petitioner did nothing in 1946 and there wasn't anything she could do to confirm or revoke the 1943 gift even if she had wanted to do something.

(3) Petitioner Did Not Delete or Relinquish Any Powers to Amend or Revoke the Trust.

Respondent cites *Latta v. Commissioner,* 212 F. 2d 164 (C. A. 3), and *Camp v. Commissioner,* 195 F. 2d 999 (C. A. 1st); however, respondent's own statement of what these cases hold demonstrates they are inapplicable to the facts presented herein.

In the *Latta* and *Camp* cases the taxpayers expressly relinquished powers to revise or revoke trusts, which powers were expressly reserved in the original trust.

In this cause, petitioner did not execute the written instrument as "trustor." Moreover, petitioner did not reserve any powers to revoke her 1943 gift or to revise the oral trust or the written instrument which was executed in 1946. Even assuming such reservation of powers to revoke or revise the trust created in 1943 (whether considered an oral trust or written trust), respondent cannot point to any act of petitioner in 1946 which could constitute a relinquishment of those alleged powers.

Respondent's cognizance of the fact that the donative intent of petitioner in 1946 cannot be established com-

pelled respondent to include a footnote in which respondent contends that even in the absence of a specific finding of donative intent in 1946, the gift tax may be predicated on the unconditional transfer of property to the guardian without receipt of full and adequate consideration of money or money's worth. Respondent cites: "*Commissioner v. Wemyss,* 324 U. S. 303, 306-307] *Merrill v. Fahs,* 324 U. S. 308, rehearing denied, 324 U. S. 888; *Farid-Es-Sultaneh v. Commissioner,* 160 F. 2d 812, 816 (C. A. 2d); *Rosenthal v. Commissioner,* 205 F. 2d 505, 509-510 (C. A. 2d); *Commissioner v. Greene,* 119 F. 2d 383, 386 (C. A. 9th), certiorari denied, 314 U. S. 641." [Resp. Br. p. 25, n. 6.]

In each of the cases cited by respondent, there was a transfer of property by the taxpayer during the year for which a gift tax was imposed.

In this cause, respondent seeks to impose gift tax in 1946, a year in which (1) petitioner made no transfer of property; (2) petitioner had no donative intent and (3) petitioner did not relinquish any powers to revoke or revise, even assuming the existence of such powers.

As noted in petitioner's opening brief [Op. Br. pp. 38-40], we do not think this Court has to consider the doctrine of *Harris v. Commissioner,* since the property was irrevocably transferred by petitioner in 1943. However, even assuming the correctness of respondent's position that petitioner made a revocable gift in 1943 and that the Court order in 1946 transferring the assets from the minor's trustee to the minor's guardian *ipso facto* transmuted the revocable gift to an irrevocable gift, it was a transfer pursuant to a Court order and under the *Harris* doctrine it was not subject to gift tax regardless of the adequacy of the consideration.

V.

Petitioner Made a Completed Oral Gift in 1943.

Respondent rests its contention that there was no completed oral gift in 1943 on the fact that the written instrument which was subsequently executed failed to include the word "irrevocable."[3]

However, respondent fails to answer the arguments contained in Points III and V of petitioner's opening brief setting forth that the uncontradicted parol evidence establishes that petitioner made an oral irrevocable gift in 1943 and that the written instrument in 1943 confirmed the fact that the gift by petitioner to her daughter was completed and was drawn accordingly. [Op. Br. pp. 25-26, 31-37.]

No useful purpose would be served by repeating herein the detailed analysis of the written instrument made in petitioner's opening brief to demonstrate that California Civil Code, Section 2280 was not applicable to the written instrument since it was not a declaration of trust by petitioner but a receipt by Mr. Goldman that he held property *owned by petitioner's minor daughter* and his agreement as to the terms and conditions pursuant to which he would

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[3]Respondent's brief states that it is questionable whether an oral trust could have been created under California law [Resp. Br. pp. 19-20, n. 5]. Any doubt that an oral trust can be created under California law is dispelled by reference to the following decisions: *Hellman v. McWilliams,* 70 Cal. 449, 11 Pac. 659 (1886); *Woodward v. Metropolitan Life Ins. Co.,* 8 Cal. 2d 361, 65 P. 2d 353 (1937); *Skellenger v. England,* 81 Cal. App. 176, 253 Pac. 191 (1927); and *De Olazabal v. Mix,* 24 Cal. App. 2d 258, 74 P. 2d 787 (1937).

In this connection, it should be noted that at the time petitioner made the oral gift, Mr. Goldman had possession of the stock.

continue to hold that property and any other property said minor might deliver to him. [Op. Br. pp. 33-35.]

Rather than answer the arguments contained at pages 31 to 37 of petitioner's opening brief, respondent chooses to rise above those arguments by insisting that this Court must look to the precise "form" of the written instrument and disregard the "substance" thereof.

We submit if this Court looks to the "substance" of the transaction, it will conclude that in 1943 petitioner intended to and did make a completed gift to her minor daughter of 800 shares of Aztec Brewing Company stock.

Moreover, even if this Court were to limit its consideration to the "form" of the written instrument, it will find that the written instrument expressly confirms the fact that petitioner's gift of the stock to her daughter *had been made*, that the minor owned said stock and petitioner had no right, title or interest therein.

Conclusion.

For the reasons set forth herein and in petitioner's opening brief, we respectfully submit that this Court should reverse thee decision of the Tax Court which imposs a $300,000.00 tax liability upon petitioner for making a $30,000.00 gift in 1943.

Respectfully submitted,

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